No. 80-441

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GULF OIL COMPANY, ET AL.,

Petitioners,

v.

WESLEY P. BERNARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICUS CURIAE* HUDSON PULP & PAPER CORP. IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	PAGE
INTEREST OF THE *Amicus Curiae*	1
SUMMARY OF ARGUMENT	7
ARGUMENT	8
I. Trial Courts Require Substantial Discretion to Deal With Actual and Potential Abuses of the Class Action Device as They Arise	8
II. Court Orders Such as That in Issue Here Are Necessary to Fulfill the Objectives of Fed.R.Civ.P. 23(d) and Are Not Unconstitutional	13
CONCLUSION	19

TABLE OF AUTHORITIES

CASES:	Page
Carlisle III v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237 (N.D. Tex. 1972)	11
Cox v. *Louisiana*, 379 U.S. 536 (1965)	10
Deposit Guaranty National Bank v. *Roper*, 48 U.S.L.W. 4279 (1980)	10-11
Farr v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975), *cert denied*, 427 U.S. 912 (1976)	8
Gannett Co., Inc. v. *DePasquale*, 443 U.S. 368 (1979)	8-10
Geders v. *United States*, 425 U.S. 80 (1976)	14
Gilley, et al. v. *Hudson Pulp & Paper Corp.*, No. 76-444-Civ.-JB (M.D. Fla., Filed 1976)	2-6
In Re Edward Gilley, et al., No. 80-5677 (5th Cir. Sept. 11, 1980)	5
N.O.W. v. *Minnesota Mining & Mfg. Co.*, 18 FEP Cases (BNA) 1176 (D, Minn. 1977)	12
Near v. *Minnesota*, 283 U.S. 697 (1931)	15
New York Times Co. v. *United States*, 403 U.S. 713 (1971)	15
Oswald v. *McGarr*, 620 F.2d 1190 (7th Cir. 1980)	12 n.5
Pennekamp v. *Florida*, 328 U.S. 331 (1946)	8
Sheppard v. *Maxwell*, 384 U.S. 333 (1966)	8, 9, 17
Stavrides v. *Mellon Nat'l Bank and Trust Co.*, 60 F.R.D. 634 (W.D.Pa. 1973)	11

Table of Authorities Continued

CASES: PAGE

Strong v. *Arkansas Blue Corss and Blue Shield, Inc.*, 87 F.R.D. 496 (E.D. Ark. 1980) ..... 11 n. 4

Taylor, et al. v. *Hudson Pulp & Paper Corp.*, No. 77-464-Civ.-WC (M.D. Fla., filed 1977) 2

United States v. *Tijerina*, 412 F.2d 661 (10th Cir.) *cert. denied*, 396 U.S. 990 (1969) 10, 15, 18

Waldo v. *Lakeshore Estates, Inc.*, 433 F.Supp. 782 (E.D.La. 1977) 10-12; 16

Weight Watchers of Philadelphia, Inc. v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972) ..... 12 n. 5

Whitney v. *California*, 274 U.S. 357 (1927) 16

Zarate v. *Younglove*, 86 F.R.D. 80 (C.D. Calif. 1980) 8

CONSTITUTIONAL PROVISIONS, STATUTES RULES AND REGULATIONS:

Rule 23, Fed.R.Civ.P ..... *passim*

Rule 21(b), FED.R.App.P 5

OTHER AUTHORITIES:

Manual for Complex Litigation (1 Pt. 2, Moores Federal Practice, Pt. II, §1.41 (1979)) 13, 15, 17

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BRIEF OF *AMICUS CURIAE* HUDSON PULP & PAPER CORP. IN SUPPORT OF PETITIONERS

Hudson Pulp & Paper Corp., with the written consent of all parties, submits this brief as *amicus curiae* in support of reversal of the decision of the Court of Appeals below.

INTEREST OF THE *AMICUS CURIAE*

Hudson Pulp & Paper Corp. ("Hudson") is a Maine corporation, with its principal operating plant in the State of Florida. Hudson is a wholly-owned sub-

sidiary of Georgia-Pacific Corporation, a Georgia corporation doing business in many regions of the United States.

Hudson is engaged in the business of processing, producing and selling pulp and paper products. Its primary operational plant is located in Palatka, Florida. At that plant, it employs over 1,500 persons, including substantial numbers of minority and female employees.

Like many employers nationwide, Hudson has been the subject of occasional charges of race and/or sex discrimination based on Title VII of the Civil Rights Act, 42 U.S.C. §2000e, *et seq.* This has occurred notwithstanding Hudson's longstanding and continuous efforts to assure that its employment practices are in full compliance with all federal and state legal requirements.

Hudson's particular interest in the issue now before the Court arises from two suits filed against it in 1976 and 1977 and the subsequent history of those cases. These were both would-be class action suits brought under Title VII and certain other federal civil rights legislation. The first, *Gilley, et al.* v. *Hudson Pulp & Paper Corp.*, No. 76-444-Civ-JB (M.D. Fla., filed 1976), alleged discrimination on the basis of race. The second, *Taylor, et al.* v. *Hudson Pulp & Paper Corp.*, No. 77-464-Civ-WC (M.D. Fla., filed 1977), alleged discrimination on the basis of sex.

Without burdening this Court with details of those cases, Hudson would point out that both illustrate the critical need for judicial supervision of would-be class actions which is the fundamental issue in this case. After four to five years of litigation, compliance with the class action requirements of Rule 23, Fed. R.Civ.P. has not been established in either case. In the *Gilley* case, the plaintiffs have repeatedly altered and expanded the class

they purport to represent. In both cases, the plaintiffs have also repeatedly changed the teams of attorneys representing them. Under these circumstances (as shown more fully below), the need for judicial supervision as a check against possible miscarriage of the class action device has been apparent. Accordingly, Hudson has a genuine and practical interest in the ability of district court judges to effectively monitor class action proceedings free of unreasonable restrictions on their judicial discretion. Given the very great volume of Title VII class actions pending in the federal courts, Hudson suggests that the issues addressed in this case are also of concern to a wide spectrum of participants in such actions.

A particular episode of the class certification proceedings in the *Gilley* case aptly illustrates both the basis of Hudson's interest in this case and, more importantly, an example of the broad practical implications for the judicial process raised by the Fifth Circuit decision here under review.

After what was then four years of litigation, and after the plaintiffs had discharged two prior sets of attorneys, an evidentiary hearing on the issue of whether a class action should be certified was convened. Significantly, however, while still represented by their second set of attorneys, a stipulation for compromise and dismissal of the action had been filed with the Court the previous year.[1] Thus, the evidentiary hearing in question addressed the issues of class certification, the

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[1] The issue of whether the plaintiffs had validly authorized their prior attorneys to settle the case is still being contested in the *Gilley* case.

scope of the class (if any) to be certified[2] and the question of whether a valid settlement had been entered.

After two days of hearings, in which plaintiffs called numerous non-party witnesses to testify as potential class members, the Court saw that the hearing was going to be quite long, and found it necessary to adjourn the hearing for approximately 50 days due to the Court's crowded trial calendar. However, during the two days of hearings the Court had determined that "the ultimate question of [class] certification may well depend upon the credibility of the witnesses." (*Gilley, supra,* Order of July 29, 1980).

Therefore, in order to preserve the integrity of the ongoing class certification hearing, the Court issued an interim order which, *inter alia*, limited communications by attorneys with potential members of the uncertified class (excepting past or prospective witnesses) during the adjournment of the hearing. Subsequently, plaintiffs filed a motion asking the Court to clarify and modify this interim order. The Court then issued an Order of Clarification which clarified some of the restrictions of the initial order, but preserved the prohibition on communication between counsel and non-party members of the uncertified class until completion of the class certification hearing. As the trial court stated in its order

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[2] The plaintiffs had purported to amend their motion for certification to encompass a class of all black employees (past, present and future) at Hudson's plant, whereas their original motion had been limited to only two departments of some 14 departments at the plant. Therefore, at the time of the hearing, the scope of even the potential class the plaintiffs were seeking to represent was riddled with uncertainty.

(*Gilley, supra,* Order of Clarification of August 29, 1980, at 3):

> The prohibition on communication between counsel and members of the proposed class, except those who are past or prospective witnesses, until the present hearing on class certification is completed, is necessitated by the specific findings of particular and potential abuses in this case made in the July 29, 1980 Order. The prohibition is made pursuant to the guidelines found in *Bernard* v. *Gulf Oil Company,* 619 F.2d 459 (5th Cir. 1980), to avoid direct and irreparable damage to the resolution of the class certification issue.

Assuming (mistakenly, as it turned out) that the *Bernard* opinion did not deprive a trial court of its indispensable power to preserve the integrity of proceedings *sub judice,* the district court felt compelled under the circumstances to impose interim restrictions on certain communications to last only during the evidentiary hearing on class certification.

The plaintiffs then filed a petition for a writ of mandamus with the Fifth Circuit, seeking to have the district court's order countermanded. The Fifth Circuit, tersely citing the *Bernard* decision, rapidly issued a one-sentence writ of mandamus vacating the district court's order insofar as it limited attorney communications with potential class members.[3] *In Re Edward Gilley, et al,* No. 80-5677 (5th Cir., Sept. 11, 1980). Giving short shrift to the district court's findings and concerns regarding particular and potential abuses, the appellate court effective-

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[3] Significantly, the writ was issued on an "emergency" basis, without directing the court or the defendants to answer the petition in accordance with the normal procedures of Rule 21(b), Fed. R. App. P.

ly authorized plaintiffs' attorneys to communicate at will with members of the uncertified class.

Hudson calls this episode to the Court's attention to point out that the ramifications of the *Bernard* decision now under review are broad indeed, and entail very substantial restrictions on the ability of district courts to respond to the peculiar problems arising in class actions. Even though the trial court's order limiting communications during the hearing recess was based on "specific findings of particular and potential abuses", the Fifth Circuit deemed this insufficient to comply with *Bernard's* standards.

District Court's charged with the duty of preserving the fairness and integrity of ongoing class certification proceedings under Rule 23(d), Fed. R. Civ. P., should not be unrealistically hamstrung in discharging those duties. The trial court has firsthand, on-the-spot familiarity with the particular problems that arise in this regard; adoption of the unrealistic standards set forth in *Bernard* will deprive trial courts of the practical ability to respond to serious threats of abuse to class action procedures and to maintain judicial control over proceedings before them.

For the reasons set forth below, Hudson submits that this Court should reverse the Fifth Circuit's *Bernard* decision insofar as it invalidates the district court order below limiting communication with potential class members.

SUMMARY OF ARGUMENT

I

The adversary system of justice is a delicate mechanism, requiring vigilant supervision by judges to preserve its orderly and efficient functioning. Accordingly, judges are necessarily vested with substantial power and discretion to supervise the conduct of parties, attorneys and other participants in the judicial process. The compelling needs of the administration of justice sometimes entail limitations on the communicative activity of the participants insofar as it impacts upon the judicial proceedings. These considerations obtain with special force in class action litigation, where district judges are specifically charged with the power and the duty to take measures to safeguard against potential abuses which are peculiar to such proceedings. In setting aside the district court order involved in this case, the Fifth Circuit would invalidate measures which have been widely recognized as appropriate in dealing with the unique problems of the class action device.

II

The Fifth Circuit applied a form of "prior restraint" analysis which is inapposite to the problems faced by district court judges in dealing with communicative abuses which are peculiar to the class action device. Judges require a reasonable degree of flexibility and discretion to forestall such abuses *before* potential class members may be subjected to misleading or confusing overtures. Under the standard imposed by the Fifth Circuit, the court would be required to withhold effective judicial supervision until an "emergency" was apparent. Since the class action device is inherently vulnerable to such abuses as improper solicitation and

undue influence, courts should be authorized to enter orders allowing them to monitor communications with potential class members without waiting for the signs of abuse to surface. Certainly where the court perceives a reasonable likelihood that abuse will occur it should have the discretion to enter such orders.

ARGUMENT

I. Trial Courts Require Substantial Discretion To Deal With Actual And Potential Abuses Of The Class Action Device As They Arise.

The adversary system of justice is a delicate mechanism. Absent the discipline and supervision imposed by presiding judges, the natural efforts of litigants to vindicate their particular claims or causes would often veer out of control, leading to confusion or even chaos in the proceedings.

Accordingly, our jurisprudence has long recognized the fundamental need for trial courts to be vested with sufficient power and discretion to preserve the integrity, fairness and order of the adversary system of justice. *See, e.g., Gannett Co., Inc.* v. *De Pasquale,* 443 U.S. 368 (1979); *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966); *Pennekamp* v. *Florida,* 328 U.S. 331, 347 (1946); *Farr* v. *Pitchess,* 522 F.2d 464 (9th Cir. 1975), *cert. cenied,* 427 U.S. 912 (1976). As one district court recently observed, "The inherent power of the court to protect the administration of justice is undisputed." *Zarate* v. *Younglove,* 86 F.R.D. 80, 101 (C.D. Calif. 1980).

In some instances (e.g., criminal pretrial suppression hearings), this Court has recognized that the exigencies of judicial proceedings are such that "a trial judge may surely take protective measures even when they are not

strictly and inescapably necessary." *Gannett Co.* v. *DePasquale, supra,* 443 U.S. at 378. Such observations merely recognize the basic and compelling need for trial judges to have sufficient discretion to deal pragmatically with situations where they perceive a genuine threat to the fair and orderly conduct of judicial proceedings before them.

Even when First Amendment concerns may be implicated, the trial court does not abdicate its responsibility to safeguard the integrity and efficiency of judicial proceedings. To be sure, this case does not involve the classic tension between uninhibited debate on public issues and conflicting governmental restrictions. The communicative activity in question here is solely incidental to the activity of parties before the court in the conduct of litigation, and impacts directly on the judicial proceedings. Nonetheless, precedents recognizing the power of the courts to limit more pristine First Amendment activity in the interests of justice are instructive.

In *Sheppard* v. *Maxwell,* 384 U.S. 333, 363 (1966), for instance, this Court recognized that communicative activity must sometimes accommodate the imperatives of the fair administration of justice where the communications in question may impact adversely on the rights of parties. The Court also emphasized that trial courts must be prepared to take steps to regulate communicative activity threatening the judicial process *before* it happens, not after the harm is already accomplished (*id.*):

> But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will portect their processes from prejudicial

> outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function.

In *United States* v. *Tijerina,* 412 F.2d 661 (10th Cir.), *cert. denied,* 396 U.S. 990 (1969), the Court upheld a trial court's order forbidding extrajudicial statements by the defendants concerning a pending criminal case against First Amendment challenge. As the Court observed there:

> The order against extrajudicial statements was designed to maintain the atmosphere essential to the preservation of a fair trial, "the most fundamental of all freedoms."

Similarly, the courts have upheld prohibitions on picketing in areas surrounding courthouses, *Cox* v. *Louisiana*, 377 U.S. 536 (1965); and the exclusion of the press from pretrial proceedings, *Gannet Co.* v. *DePasquale*, 443 U.S. 370 (1979).

The common thrust of such precedents was aptly summarized by the court in *Waldo* v. *Lakeshore Estates, Inc.*, 433 F. Supp. 782, 790 (E.D.La. 1977), *appeal dismissed*, 579 F.2d 642 (5th Cir. 1978), (upholding a local rule limiting communication with potential class members) as follows:

> It is well settled that the courts may reasonably protect the integrity of their proceedings by limiting activities normally protected by the First Amendent.

In would-be class actions in particular, the trial court must exercise considerable power and discretion to protect the interests of absent potential class members, as well as the integrity of the class action device itself. *See, e.g., Deposit Guaranty National Bank* v. *Roper*, 48

U.S.L.W. 4279 (1980); *Carlisle III* v. *LTV Electrosystems, Inc.*, 54 F.R.D. 237, 240 (N.D. Tex. 1972); *Waldo* v. *Lakeshore Estates, Inc.*, *supra*; *Stavrides* v. *Mellon Nat'l Bank and Trust Co.*, 60 F.R.D. 634, 637 n. 6 (W.D. Pa. 1973). Would-be class actions involving attempts to represent large "across-the-board" classes carry the potential for improper solicitation, misrepresentation of the nature and status of the litigation, and conflicts of interest among subclasses with antagonistic objectives.[4] As one district court observed in considering the need for reasonable curbs on unfettered communication by attorneys in the class action context, *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 790:

> It is one we find all the more compelling in the class action framework, given the heightened susceptibilities of nonparty class members to solicitation amounting to barratry as well as the increased opportunities of the parties or counsel to "drum up" participation in the proceeding. Moreover, it is likely that uninvited and unapproved communications to this effect "may appear [to the party solicited] to be an authorized activity approved by the court, simply by reference to the title of the court, the style of the action, the name of the judge, and to official processes."

A related source of potential abuse inhering in the large class action is the "mass meeting" conducted by counsel for the putative class. Absent local rules or court

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[4] *See, e.g., Strong* v. *Arkansas Blue Cross and Blue Shield, Inc.*, 87 F.R.D. 496 (E.D. Ark. 1980). Effective judicial monitoring of communications with potential class members is one means of guarding against the problem of overinclusive representation and accompanying intra-class conflicts.

orders such as that in issue here, such meetings present the opportunity for a multitude of abuses which have been recognized by the courts. As observed by the court in *N.O.W.* v. *Minnesota Mining & Mfg. Co.*, 18 FEP Cases (BNA) 1176, 1179 (D. Minn. 1977):

> It is the considered opinion of the court that any attempt to conduct and manage such litigation in the context of mass meetings conducted by attorneys for the parties for the purpose of discussing the status of the litigation would end in chaos. There would be no way to avoid the dissemination of misinformation and to preserve the integrity of the class action procedure. In order to avoid the potential for abuse in the cases now before the court, the court deems it appropriate to require that all communications to large numbers of class members be made in writing and with the prior approval of the court.

Similar concerns moved the district court to hold as follows in *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 794:

> However, we categorically oppose the notion that a policy allowing unfettered communication to encourage participation in a class suit is consistent with the purpose of Federal Rule 23. The potential abuses attendant upon such unregulated communication clearly undermine the efficacy of the class action device.

The various court decisions[5] which have approved necessary restrictions on communication with potential

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[5] *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers International, Inc.*, 455 F.2d 770 (2d Cir. 1972); *Waldo* v. *Lakeshore Estates, Inc., supra; N.O.W.* v. *Minnesota Mining & Manufacturing Co., supra; cf. Oswald* v. *McGarr*, 620 F.2d 1191, 1195 (7th Cir. 1980) (refusal to issue writ of mandamus despite claim that

class members of the kind at issue here are of course not the only source of authority running contrary to the Fifth Circuit's *Bernard* decision. The model order of the *Manual for Complex Litigation* (1 Pt. 2, Moores Federal Practice, Pt. II, §1.41 (1979)) and the numerous local rules closely patterned after it reflect the combined legal wisdom of an imposing aggregate of judges, legal scholars, and knowledgeable practicing lawyers. The core conclusion of all this persuasive authority is that, given the *inherent* danger of communicative abuse in the class action context, district courts must have a substantial measure of authority and discretion to exercise close and effective supervision over communications with potential class members by counsel and parties. Indeed, these authorities recognize that the potential for abuse is so basic that judges should be authorized to enter reasonable monitoring orders of the kind in issue here as a precautionary measure without the obligation to engage in painstaking, case-by-case analysis.

In contrast, the holding in *Bernard* imposes an improvident rule of law which effectively deprives the trial court of the means to effectively monitor abuse of the class action device.

II. Court Orders Such As That In Issue Here Are Necessary To Fulfill The Objectives Of Fed R. Civ. P. 23(d) And Are Not Unconstitutional.

The fundamental error of the Fifth Circuit's *Bernard* decision is that it misapplies traditional "prior restraint" analysis to circumstances where such analysis

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district court's refusal to allow counsel to send a separate communication to subclass members detailing counsel's objections to a settlement offer violated First Amendment).

is inapposite. The result is to impose on district judges an unrealistic and impractical constraint on their discretion to monitor and supervise otherwise unwieldy class actions, under Rule 23(d), Fed.R.Civ. P.

As noted above, there are a wide variety of circumstances where the practical exigencies of the judicial process necessarily entail restrictions on unfettered communication by participants in that process. For instance, no one would deny the Court's power to sequester witnesses from talking to each other or to attorneys during the course of an ongoing hearing. As this Court noted in *Geders* v. *United States*, 425 U.S. 89, 87 (1975):

> The Judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony.

Sequestration is of course an extreme restraint on the freedom to communicate, yet few would question the court's power to sequester as a necessary aspect of the judicial process. Such measures are routinely and properly treated as matters of judicial procedure rather than as First Amendment questions. The element of "speech" involved is subject to supervision only insofar as it is implicated in the judicial proceedings before the court.

In that respect, court orders and rules designed to monitor communication with potential class members concerning the case are but a logical extension of the court's power (and duty) to preserve the integrity and fairness of judicial proceedings. In the case at bar, the impetus for the order was the court's concern that unmonitored communications by counsel might tend to misrepresent the status, purposes or effects of the class action to potential class members. The interim order

entered by the district court in the *Gilley* case involving the *amicus* (discussed *supra*) stemmed from that court's concern to preserve the integrity and spontaneity of testimony in an ongoing evidentiary hearing on class certification. In both circumstances, the judge was simply taking measures deemed necessary to deal with concrete incidents which threatened the fair and orderly conduct of proceedings under the court's jurisdiction. The trial court's first hand familiarity with the particular facts and incidents involved in such circumstances give it a unique perspective to balance the conpeting interests at stake.

The Fifth Circuit's *Bernard* decision effectively deprives trial courts of the necessary discretion to deal with the well-catalogued abuses of the class action device. The court employed a form of prior restraint analysis which is unexceptionable when applied to cases where pristine First Amendment values are at stake, e.g., *New York Times Co.* v. *United States*, 403 U.S. 713 (1971); *Near* v. *Minnesota*, 283 U.S. 697 (1931); but which is inapposite and unduly mechanistic when the issue is only incidentally one of speech but essentially one of judicial procedure. *Compare*: *United States* v. *Tijerina*, *supra*, 412 F.2d at 666 ("[T]he Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about a trial").

To effectively incorporate the "clear and present danger" test into Rule 23(d) of the Federal Rules of Civil Procedure would be to shackle the district court's ability to manage and monitor class action litigation to an unprecedented degree. The widespread adoption of local court rules and orders patterned after the Model Order from the *Manual for Complex Litigation* reflects a substantial judicial consensus that a presumption of

unconstitutionality does *not* attach to orders of the kind in issue here.

Significantly, the order in question here reserves the attorneys' right to proceed with communications they deem constitutionally protected. It is therefore a monitoring order rather than a restraining order. Accordingly, it does not fall within the category of orders which deprive the speaker of the right to assert unconstitutionality as a defense in ensuing contempt proceedings. The attorney's good-faith conviction of his constitutional right to communicate under the order would be a valid defense. As specifically held by the court in *Waldo* v. *Lakeshore Estates, Inc.*, *supra*, 433 F. Supp. at 789, restrictions including such an escape clause simply do not trigger "prior restraint" analysis.

The Fifth Circuit's own analysis in this case reveals the extremity of its consequences. The Court clearly indicated that "Only an *emergency*" can justify restrictions upon the attorneys' unfettered right to communicate with the actual or potential class members. 619 F.2d at 474 (emphasis added; quoting *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). Indeed, the Fifth Circuit even acknowledged that one respectable school of thought holds that under prior restraint analysis, "everything, or virtually everything, is entitled to be published at least once." *Id.*

Thus, the logical consequence of the Fifth Circuit's *Bernard* holding would be to require class action trial courts to wait until an *emergency* arose before taking measures to supervise what amount to inherently abuse-prone communications between attorneys and potential class members. But by the time an emergency is apparent to the Court, the disruptive seeds would already

be sown or the potential class members would already be infected by confusion concerning the case. It is evident, therefore, that the standards enshrined by the Fifth Circuit in *Bernard* would place trial courts at the mercy of events in class actions, and generate recurring conflict with their responsibilities under Rule 23(d) to supervise the progress of the action. In this respect, the *Bernard* holding runs directly contrary to what this Court emphasized in *Sheppard* v. *Maxwell, supra*, 384 U.S. at 363, respecting prompt and effective court action to deal with communications disrupting judicial processes: "[W]e must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception."

Accordingly, the precautionary approach embodied in the recommendations of the *Manual for Complex Litigation* (and in the local rules patterned after it) represents a sound policy for dealing with the inherently sensitive problem of attorney communications with potential members of an uncertified class. Following the *Manual's* recommendations, the district court could enter an order (such as that in issue here) allowing it to monitor such communications *before* any misuse of class action mechanisms occurred. Such a practice is especially appropriate and justified in light of the district court's authority and duty under Rule 23(d), Fed. R.Civ. P., to take necessary measures to protect absentee class members and otherwise assure "the fair conduct of the action."

Alternately, the *amicus* respectfully submits that the appropriate standard of review for orders designed to monitor communications with actual or potential class members should be similar to that used by the court in

United States v. *Tijerina, supra*, as applied to orders forbidding extrajudicial discussion of the merits of a pending criminal case. There, the court observed as follows (412 F.2d at 666):

> Counsel attack the order on the ground that it is not based on a clear and present danger. The order is based on a "reasonable likelihood" of prejudicial news which would make more difficult the impaneling of an impartial jury and tend to prevent a fair trial. We believe that reasonable likelihood suffices. The Supreme Court has never said that a clear and present danger to the right of a fair trial must exist before a trial court can forbid extrajudicial statements about the trial.

Similarly, trial courts should be able to issue orders allowing them to supervise or limit communications with actual or potential class members at least when they perceive a "reasonable likelihood" that such communications will prejudice the fair and orderly conduct of the class action. Hudson submits that the facts shown in the record of this case are clearly sufficient to meet such a standard. Accordingly, the Fifth Circuit's decision under review should be reversed, inasmuch as it was based upon an unduly restrictive constraint on the ability of trial courts to respond effectively to the exigencies posed in class action litigation.

CONCLUSION

For the foregoing reasons, amicus curiae Hudson Pulp & Paper Corp. respectfully urges that the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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